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Supreme Court of the United States

OCTOBER TERM 1936.

No. 652.

GREAT ATLANTIC AND PACIFIC TEA COMPANY, *et al.*,
Appellants,

against

ALICE LEE GROSJEAN, Supervisor of Public Accounts, State of Louisiana, *et al.*,
Respondents.

BRIEF FOR APPELLANT, F. W. WOOLWORTH CO.

MARTIN A. SCHENCK,
WILLIAM J. CARR,
Solicitors for Appellant,
F. W. Woolworth Co.

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No. 652

BRIEF FOR APPELLANT,

F. W. WOOLWORTH CO.

F. W. Woolworth Co., an intervenor party plaintiff (R. p. 33) appeals from a final decree of a three judge court which dismissed a complaint brought to enjoin the Louisiana Chain Store Act (No. 51-1934) and which held the act valid and not a violation of the Constitution of the United States (R. p. 273). The opinion below is reported in 16 F. Supp. 499.

Jurisdiction.

The appeal is by virtue of Section 238 of the Judicial Code, and probable jurisdiction has been noted on February 1, 1937.

Statement.

The act complained of recites (Sec. 1) "that because of the advantages accruing from the operation of multiple stores wherever situated, and because of the basic difference inherent in such character of operations", the license tax (Sec. 3) "levied upon the store or stores operated in the State of Louisiana shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this state or not, and shall be fixed and graded as follows":

> (Then follows sixteen separate paragraphs wherein is provided a graduated tax from $10 per store to $550 per store, depending upon the total stores wherever operated, from 1 store to 500 or more stores.)

The complaint alleges in regard to the plaintiff's business that a substantial portion of its merchandise is bought in other states and is shipped to the plaintiff in Louisiana and sold by plaintiff at retail, in many cases in the original package (R. p. 3).

The defendants' answer asserts (as justification for the tax) greater advantages accruing to operators of chain stores in purchasing direct from manufacturers and states that it was the purpose of the statute "to some extent to place the independent retailer and the small chain operator, through taxation, on a parity with those operating a vast number of units backed by unlimited capital" and in so doing, "to protect the citizens of Louisiana and promote their general welfare" (R. p. 43). The answer alleges that it is the policy of chain organizations to supply all the multiple units by a central buying unit (R. p. 50) and asserts "the superior ability of the larger chains to absorb the tax by reason of operating nationally" and by spreading "the tax imposed upon its local units over its many stores locally, as

well as nationally" and by recovering the resultant decrease in profits by "charging higher prices for commodities in stores located in other territory" (R. p. 62).

In regard to F. W. Woolworth Co., the merchandise is listed to the store by the Woolworth buyer; it is ordered by the store direct from the manufacturer; it is shipped directly to the store by the manufacturer and it is charged to the store by the company at the prices paid by the company to the manufacturer. The store pays the charges for shipment of all merchandise to it. These charges are added to the cost of the merchandise in each particular store (R. p. 177).

F. W. Woolworth Co. is a New York corporation and on January 1, 1935 operated 1811 stores located in the United States, 37 in Canada, 8 in Cuba, and 81 in Germany (R. p. 267).

The Louisiana operations of F. W. Woolworth Co. for the year 1932 showed a loss, and for the years 1930-1934 showed earnings of the Company in Louisiana substantially less than its earnings outside of Louisiana. The records of F. W. Woolworth Co. indicate that in the year 1934 the Louisiana net income per store was about half the average of the income per store of the stores in the St. Louis District, which comprises 189 stores in eleven different states, including Louisiana. This was due to the more unfavorable conditions of operations in Louisiana (R. pp. 171-172).

The Court below has found:

> "Operations of chains doing business in more than one state vary greatly from section to section and from state to state because of differences in local conditions, economic and otherwise, freight rates added to cost, remoteness from headquarters and executive management, increase in difficulty of supervision, local competition and other factors. Conditions as to sales and profits vary greatly in all classes of stores according to the section of the country in which they are located. In almost every case operations in Louisiana are less than average for all stores operated by the particular company" (R. p. 266).

Specification of Errors.

This appellant urges the assignments of error printed at page 275 et seq. of the Record and urges particularly that the Court below erred, in refusing to hold that the statute violates the Fourteenth Amendment of the United States in taxing property and operations beyond the jurisdiction of the State (assignment No. 1, R. p. 276) and is invalid because it burdens and interferes with interstate commerce (assignment No. 11, R. p. 277).

Summary of Argument.

The tax, within the recent decisions of this Court, is purely arbitrary, having no relationship to values.

The tax is upon operations exterior to Louisiana and constitutes a burden on interstate commerce.

POINT I.

The Tax Act is unjustifiably unequal and arbitrary. The increase in the rate has no relationship to the values or rights taxed.

In the case of F. W. Woolworth Co., the tax rate upon each of its stores within Louisiana is controlled by the number of stores it operates in Germany, in Canada, as well as in the United States. The tax does not purport to be controlled or influenced by value of property within Louisiana or by value or extent of rights exercised in Louisiana. On the contrary it in terms is based on "advantages" from operation of stores outside Louisiana. And these "advantages", arbitrarily determined by number of store locations outside the state boundary, control whether the tax is to be $10 per store or $550 per store in Louisiana.

In *Liggett Co.* v. *Lee*, 288 U. S. 517, this same "boundary" characteristic of a chain store act was held to be arbitrary and discriminatory. The graduated scale applied to all stores within a single county but if a store were added outside the county, the license fee for each was materially increased. This Court, at page 534, said:

> "There is no more reason for adopting the county line as the measure of the tax than there would be for taking ward lines in cities or arbitrary lines drawn through the state regardless of county boundaries."

The drawing in the case at bar of a state boundary as the measure of the tax involves other elements of invalidity, but, it would seem, is here of the same character of arbitrariness as has been recently passed upon by this Court in respect of county boundaries. In fact the extreme of arbitrariness is here reached for the additional stores give the presumed "advantages" as the basis for increasing the rate, whether they are just across the state line or in Canada.

In *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, the Kentucky Gross Sales Tax required every retail merchant to pay an annual license tax for operating any store within the State determined by computing the tax on gross sales graduated on the amount of sales. This Court held that such classification denied the equal protection of the laws assured by the Fourteenth Amendment. It stated that the statute operated to take as the tax a percentage of every dollar due or paid on every sale but increased the percentage if the sale which was the occasion of the tax, succeeds the consummation of other sales of a specified aggregate amount. The Court stated that the operation of the statute was unjustifiable, unequal, whimsical and arbitrary and pointed out that the gross sales of a merchant did not bear a constant relation to his net profits and that the

graduated rates imposed were not intended to bear any relation to net profits.

The present tax act is even more arbitrary, in the distance which openly separates it from any consideration of values within Louisiana and in the purely mathematical character of its graduation on stores beyond the boundary of Louisiana.

POINT II.

The Act is a regulation of and a tax upon business beyond the jurisdiction of the State of Louisiana, and constitutes a burden upon interstate commerce.

In *Wallace* v. *Hines,* 253 U. S. 66, the Act of North Dakota levied an excise tax on that portion of a railroad's stocks and bonds as its mileage within the State bore to its entire mileage both within and without the State.

This Court, per Holmes, J., at page 69, said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart —not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State."

This rule, in the case at bar, has been violated. The tax is here because of "*advantages* accruing from the operation of multiple stores *wherever situated.*" The thing taxed and its location and the elements which govern the amount of the tax are all outside Louisiana. No attempt has been made to arrive at true value of the things within the State. The State has not here sought by consideration of value of the entire system to arrive at a fair ratio to thus determine fair value of the right to transact business within its borders; for here the very graduation from $10 to $550 depends on ignoring any ratio of values but following pure numerology in matters beyond state borders.

The purposes of such anti-chain store acts (as reviewed by Brandeis, J. dissenting in *Liggett Co.* v. *Lee*, 288 U. S. 517) when read into this statute reveal the astounding extent to which the State has here attempted to project its regulatory legislation into other States.

In *Looney* v. *Crane Co.*, 245 U. S. 178, the Crane Co., an Illinois corporation, carried on its business of manufacturing and dealing in hardware, etc. not only in Illinois but in other states by shipment of merchandise on orders obtained and sent to Chicago for execution. The Company moreover established agencies in other states to which goods were shipped from Chicago and other points and from which agencies the goods were sold. Texas enacted a statute permitting foreign corporations to do business at a minimum charge of $25 based upon $100,000 of capital stock and also levied a franchise tax on foreign corporations calculated (under the Act of 1907) upon the aggregate of the amounts of capital stock plus surplus and undivided profits. In the same year there was also enacted a law vastly increasing the amount of the permit tax. This Court affirming an interlocutory judgment against the enforcement of the statutes, at pages 187, said:

> "It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax

> were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process."

The Court further, at page 188, said:

> "Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment."

In the case at bar, the "advantages accruing from the operation of multiple stores wherever situated" which cause the tax and which are the things taxed, consist mainly in economies in buying goods outside the State and in economies of transportation of such goods into the State. And this economy of source and direction (of what is necessarily interstate commerce) is officially asserted as the advantage justifying the tax (Defs.' ans. R. p. 43). The tax even more clearly than in *Looney* v. *Crane* (supra) is a direct burden on interstate commerce. Here the burden is arbitrarily graduated and increased with the extent of those beyond-boundary advantages of operation in respect of goods coming into the state for sale.

In *Baldwin* v. *Seelig*, 294 U. S. 511, it was held that the New York Milk Control Act could not be applied against a dealer who had acquired title to milk as a result of a transaction in interstate commerce, this Court, per Cardozo, J., at 521, saying:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported."

This Court further said, page 522:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." • • •
>
> "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

This Court further, at page 527, said:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place or origin. They are thus hostile in conception as well as burdensome in result."

In the case at bar the erection of barriers against interstate competition is intended. For the local retailer, through taxation, is intended to be placed on a parity in competition with the foreign corporation which will be compelled to absorb the tax by operating nationally and by charging higher prices for commodities in stores located outside the state (Defs.' ans. R. pp. 43, 62, 63).

Here the occupation tax for the privilege of conducting the local business has in terms been increased because of the business done beyond the boundaries of Louisiana. The graduation of the tax, against the advantages of operation has the clear and unmistakable purpose and effect of burdening the interstate business.

Cooney v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384.

POINT III.

The decree below should be reversed and a decree should be directed enjoining the enforcement of the Act.

Respectfully submitted,

MARTIN A. SCHENCK,
WILLIAM J. CARR,
Solicitors for Appellant,
F. W. WOOLWORTH CO.